

VINCE RABAGO LAW OFFICE PLC

500 N. Tucson Blvd. Ste. 100
Tucson, Arizona 85716
(520) 955-9038 (888) 371-4011 (Fax)
Vince Rabago State Bar No. 015522
Stacy Scheff State Bar No. 028364
Attorneys for Plaintiffs

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

AMERICAN FRIENDS SERVICE
COMMITTEE, JOYCE CLAYTON, ORALEE
CLAYTON SR.,

Plaintiffs

vs.

JANICE K. BREWER, GOVERNOR OF THE
STATE OF ARIZONA; CHARLES RYAN,
DIRECTOR OF THE DEPARTMENT OF
CORRECTIONS,

Defendants.

Case No.: CV2011-017119

**MOTION FOR INJUNCTION PENDING
APPEAL PURSUANT TO RULE 62(C),
ARIZ. R. CIV. PROC. AND ALSO
PURSUANT TO RULE 7(D), ARIZ. R.
CIV. APP. PROC.**

Hon. Arthur T. Anderson

Plaintiffs, by and through undersigned counsel, move this Court, pursuant to Rule 62(c), Ariz.R.Civ.P., and pursuant to Rule 7(d), Ariz. R. Civ. App. Proc., to issue an Order restraining and enjoining Defendants, pending appeal, from signing any contracts pursuant to A.R.S. § 41-1609, for the reason that once signed, the contracts cannot be modified or negotiated to comply with the requirements of A.R.S. § 41-1609.01, and until the requirements of subsection (K) are met, Defendants cannot comply with A.R.S. § 41-1609, and will likely force Arizona taxpayers to spend tax revenue improperly, inefficiently, and in violation of state law, and to result in new private prison contracts that will ultimately continue to place the Plaintiffs and the public in potential danger from security breaches such as those which caused the escapes of three violent felons from a private facility in 2010, resulting in the murder of a couple on vacation.

This Motion is supported by the accompanying Memorandum of Points and Authorities.

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MEMORANDUM OF POINTS AND AUTHORITIES

A. Background

On September 12, 2011, Plaintiffs American Friends Service Committee (AFSC), Joyce Clayton and Oralee Clayton Sr. filed this lawsuit and also requested a Temporary Restraining Order to prevent Defendants from awarding any contracts pursuant to A.R.S. § 41-1609 until an Order to Show Cause hearing could be held on the requested Preliminary Injunction. The purpose of the Preliminary Injunction was to prevent Defendants from awarding any contracts until the study required by—and complying with—A.R.S. § 41-1609.01(K) is completed.

A return hearing was held on September 20, 2011, at which time the request for a TRO was denied, however the Court ordered the Defendants to notify all parties if a contract signing was imminent so that the TRO could be reconsidered at that time.

Defendants filed a Motion to Dismiss on September 26, 2011. On October 14, 2011, a hearing on the Motion to Dismiss was held.

On October 28, 2011, the Court granted Defendants' Motion to Dismiss on the grounds that A.R.S. § 41-1609.01 does not imply a private right of action. Plaintiffs filed a Notice of Appeal at the same time as the instant Motion for Injunction Pending Appeal.

Plaintiffs request expedited consideration of this Motion by November 21, 2011, due to reports that Defendant's decision to award new contract(s) was pushed to November 22, 2011, though recent media also suggests the date was pushed back to December 22, 2011.

B. Law & Argument

This Court should grant Plaintiffs' Motion for an Injunction Pending Appeal because the final judgment on Defendants' Motion to Dismiss addresses procedural aspects of Plaintiffs' case, but there is irreparable harm that will result if Defendants proceed with signing contracts with

1 private prison providers in violation of Arizona law. Procedural aspects as to standing may be
2 cured on appeal, but the irreparable harm that will result if Defendants are not enjoined cannot.

3 Arizona Rule of Civil Procedure 62(c) provides that when an appeal is taken from a final
4 judgment denying an injunction, the trial court may “suspend, modify, restore, or grant an
5 injunction during the pendency of the appeal upon such terms as to bond or otherwise as it
6 considers proper for the security of the rights of the adverse party.”

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8 Arizona Rule of Civil Appellate Procedure 7(d), which permits stays pending appeal, also
9 specifically provides that an appellate judge or court may grant an injunction pending appeal but
10 that any such request under that Rule must first be presented to the superior court:

11 **(c) Power of Appellate Court Not Limited.** The provisions of Rule 7 do not lim-
12 it any power of the appellate court or of a judge or justice thereof to stay proceed-
13 ings during the pendency of an appeal, or to suspend, modify, restore, or grant an
14 injunction during the pendency of an appeal, or to make any order appropriate to
15 preserve the status quo or the effectiveness of the decision subsequently to be
16 entered. However, an application for an order pursuant to this rule must be made
17 in the first instance in the superior court.

18 The same rules apply to a preliminary injunction apply to injunctions sought pending
19 appeal. In order to obtain a preliminary injunction, the party seeking the injunction must show
20 four things:

- 21 1. a strong likelihood of success on the merits;
- 22 2. irreparable harm if the stay is not granted;
- 23 3. that the harm to the requesting party outweighs the harm to the party
24 opposing the stay; and
- 25 4. that public policy favors the granting of the stay.

26 *Smith v. Arizona Citizens Clean Elections Com'n*, 212 Ariz. 407, 410, 132 P.3d 1187, 1190
(2006).

Plaintiffs here meet all four elements.

1 1. *A strong likelihood of success on the merits.*

2 This Court's judgment for Defendants rested on standing and private right of action
3 grounds. Plaintiffs assert that the likelihood of success on the merits is still strong. The Order
4 granting Defendants' Motion to Dismiss based on Arizona Rule of Civil Procedure 12(b)(6) did
5 not address the merits of Plaintiffs' case, but rather granted dismissal based on a finding that
6 A.R.S. § 41-1609.01 did not imply a private right of action. However, as was asserted before
7 this Court and will be asserted on appeal, no private right of action is necessary for a Declaratory
8 Judgment or to find taxpayer or organizational-representative standing to seek such Declaratory
9 Relief, and second, even if a private right of action is necessary, one is certainly available to all
10 taxpayers who have sufficient evidence that they have been injured by taxpayer money being
11 spent in violation of Arizona law.

12 In *American Federation of State, County and Mun. Employees, AFL-CIO, Council 97 v.*
13 *Lewis*, 797 P.2d 6, 165 Ariz. 149 (Ariz. App., 1990), AFSCME sued based on the same statute as
14 Plaintiffs do here. Defendants in that case similarly defended on the grounds that the complaint
15 failed to state a claim upon which relief could be granted. Defendants in that case claimed that
16 there was no justiciable controversy because no taxpayer funds had been expended, thereby
17 admitting that, had taxpayer funds been spent, plaintiffs would have a claim. Defendants in this
18 case are the successors in interest to Defendants in that case and should be estopped from now
19 claiming that there is no right of action after nearly a quarter century of expenditure of taxpayer
20 funds. It is clear that taxpayers do have standing because not only has taxpayer money been
21 spent, but with future contracts, huge sums will be spent in violation of Arizona law. A
22 declaratory judgment is intended for this exact purpose: to stop an illegal action before it starts.

23 The instant Motion to Dismiss was granted on the grounds that Plaintiffs were not the
24 intended beneficiaries of the statute on which they sue, and that therefore the statute does not
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1 imply a private right of action, apparently finding that the Joint Legislative Budget Committee is
2 the intended beneficiary of the statute. This ruling is error because taxpayers are clearly the
3 intended beneficiaries if the statutory scheme is analyzed as a whole. The members of the Joint
4 Legislative Budget Committee are not there to receive benefits of a particular statute, but to act
5 in representative capacity for the voters who elected them.

6 Furthermore, even if a “private” right were required, courts may find an implied private
7 right of action in other sections of the statutory subject of which the statute relied upon is merely
8 a part. For example, in *Bunker's Glass Co. v. Pilkington, PLC*, 75 P.3d 99, 102, 206 Ariz. 9, 12
9 (Ariz., 2003), the Arizona Supreme Court decided *en banc* that the Arizona Antitrust Act implied
10 a private right of action for indirect purchasers because, in the definition section of the statutory
11 subject, the term “person” was defined as including “individuals”, therefore, “the legislature
12 signaled its intent to allow indirect purchasers to sue, because individuals are rarely direct
13 purchasers.”
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15 A.R.S. § 12-1832, the statute which gives Plaintiffs here a private right of action,
16 similarly states: (emphasis added)
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18 Any **person** interested under a deed, will, written contract or other writings
19 constituting a contract, or whose rights, status or other legal relations are affected
20 by a statute, municipal ordinance, contract or franchise, may have determined any
21 question of construction or validity arising under the instrument, statute,
22 ordinance, contract, or franchise and obtain a declaration of rights, status or other
23 legal relations thereunder.

24 Here, Plaintiffs rights to (have their son/members) be free of cruel and unusual
25 punishment according to the Eighth Amendment to the United States Constitution will be
26 affected by both the statute, and the contracts that the Defendants intend to enter into, therefore
Plaintiffs clearly have a private right of action here.

Additionally, there are several references to “security” and "public safety" in the statute
itself as well as in the surrounding statutes on the subject of the State Department of Corrections

1 which indicate that the public—and hence AFSC and the Claytons—is intended to benefit from
2 the laws regarding the operation of both public and private prisons. A.R.S. §§ 41-1601 et. seq.
3 Additionally, A.R.S. § 41-1609.02 states clearly that notice must be given to the representatives
4 of the private citizens who live in the immediate area where a private prison may be sited, as
5 well as the citizens themselves: (emphasis added)

6 E. Before incurring any obligation for the establishment of any private
7 incarceration facility, the department shall give at least sixty days' written notice
8 to all of the following:

- 9 1. The president of the senate.
- 10 2. The speaker of the house of representatives.
- 11 3. The senate minority leader and the house of representatives minority
12 leader.
- 13 4. The state senator and the state representatives whose legislative district
14 includes the proposed site.
- 15 5. Any state senator and state representatives whose legislative district is
16 located within two miles of the proposed site.
- 17 6. Each member of the county board of supervisors if the proposed site is
18 in an unincorporated area or each member of the governing body of the
19 city or town in which the proposed site is located.
- 20 7. Each member of the governing board of the local school district in
21 which the proposed site is located.

22 F. The department shall hold a hearing in the county for an unincorporated area or
23 in the city or town in which the potential site is located. **The department shall
24 publish a notice of the public hearing in a newspaper of general circulation** in
25 the area at least ten days before the hearing. After the public hearing, the
26 department shall make a final site determination for the private incarceration
facility.

A.R.S. section 41-1609.03 provides for liability of private contractors for “public safety...
services” provided by the state to the contractor. The only reason for the legislature to put such a
provision is if it anticipated that the public may be put in danger by private prison contractors
and wanted them to have the ability to protect themselves – which is what they are doing in this
suit.

A private contractor that contracts with any governmental entity to provide
detention or incarceration services for offenders shall be liable for the cost of any
emergency, public safety or security services provided to the contractor by the
state or any political subdivision of the state and shall reimburse the state or any
political subdivision of the state for the cost of any such services.

1 41-1609.05 states that one of the goals of the Community Accountability Pilot Program
2 for helping offenders re-integrate into the community is: “5. Enhancing public safety”. If private
3 prison contractors must show that they can provide the same quality of services as the state, then
4 they are also responsible for the goal of enhancing public safety, and therefore imply that the
5 public is the intended beneficiary of the statutory scheme under the subject “State Department of
6 Corrections.”

7 Additionally, this Court erred in not giving Plaintiffs the benefit of all reasonable
8 inferences as required when new evidence is presented in a motion to dismiss on the pleadings,
9 especially those inferences supporting the existence of standing to proceed. In *AFSCME*, the
10 procedural posture of the case was slightly different because Defendants had answered the
11 complaint before moving for summary judgment on the pleadings, however, both Rules 12(c)
12 and 12(b)(6) state that if “matters outside the pleading are presented to and not excluded by the
13 court, the motion shall be treated as one for summary judgment and disposed of as provided in
14 Rule 56, and all parties shall be given reasonable opportunity to present all material made
15 pertinent to such a motion by Rule 56.”

16 In this case, at the Hearing on the Defendants' Motion to Dismiss, the Defendants raised
17 arguments that had not been raised in the pleadings, namely the defense that subsection (K) is not
18 a prerequisite to awarding contracts because it would be impossible to perform such studies with
19 regard to contractors who had never operated in Arizona before, and introduced related
20 documents. Regardless of the merits of this argument, it was not raised in the only pleading
21 submitted by Defendants, therefore the Motion to Dismiss should have been treated as a Motion
22 for Summary Judgment. Summary judgment is appropriate only when there is no genuine
23 dispute of material fact, when only one inference can be drawn from the undisputed material
24 facts, and when the moving party is entitled to judgment as a matter of law. Rule 56, Arizona
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1 Rules of Civil Procedure; *Pritchard v. State*, 163 Ariz. 427, 788 P.2d 1178 (1990). Plaintiffs also
2 presented – and the court accepted—documentation as to Defendant’s failure to comply with the
3 law as acknowledged in the report by the Arizona Auditor General.

4 Here, Defendants have not answered the complaint to assert any facts at all; therefore, if
5 this Court had given Plaintiffs the benefit of all reasonable inferences as required on a Motion for
6 Summary Judgment, the Court should have found for Plaintiffs. This error will likely be
7 rectified on appeal, remanding the case for a hearing on the merits. Therefore the likelihood of
8 success on the merits remains for Plaintiffs/Movants.

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10 2. *Irreparable harm if the stay is not granted.*

11 The harm that would result if the stay is not granted is irreparable because, once the
12 contracts are awarded and signed, the Defendants will be bound by the contracts, and the
13 contractors would have a cause of action against the State for breach of contract if Defendants
14 found, after the fact, that the contractors do not meet the requirements of A.R.S. § 41-1609.01.
15 Once the bid is awarded, even if the contractor breaches it by failing to carry out appropriate
16 safety precautions and security, the state may be barred from termination of the contract. *Ry-Tan*
17 *Construction Inc. v. Washington Elementary School*, 111 P.3d 1019, 210 Ariz. 419 (Ariz., 2005)
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20 3. *The harm to the requesting party outweighs the harm to the party*
21 *opposing the stay.*

22 The essence of Plaintiff’s Complaint is to prevent these private prisons contracts from
23 being awarded before the Defendants have the opportunity to ensure that the prisons will be run
24 according to the standards required by the State of Arizona. If contracts are awarded,
25 Defendants will be powerless to enforce the state's standards, should they be declared deficient in
26 the comparison study. *Ry-Tan*.

1 The harm to the requesting party outweighs the harm to the party opposing the injunction
2 because, as stated above, if the injunction is granted, the Defendants will have the opportunity to
3 complete the comparison study before the contracts are awarded. Because Defendants are
4 already under a duty to complete the study, there is no harm whatsoever to the Defendants.

5 The harm to the Plaintiff if the injunction is not granted is, a) violation of the state statute,
6 b) to forever lose the opportunity to hold the contractors responsible for adequate standards of
7 security, programs, administration, and other factors, c) to commit taxpayers funding into the
8 future to wasteful and dangerous uses, and d) to retain inmates who are members of Plaintiff
9 AFSC in dangerous conditions.
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12 4. *Public policy favors the granting of the stay.*

13 Public policy favors the granting of an Injunction Pending Appeal because the intent of
14 the legislature to monitor and hold private prison contractors accountable is evident in the
15 language of A.R.S. 41-1609.01 and the law of Arizona. It is not only in the interests of the
16 legislature, but also the citizens of Arizona to have these measures in place, and to enforce them,
17 to prevent further harm to both citizens and visitors of Arizona, such as the harm that was
18 inflicted by three escaped prisoners from the private facility in Kingman, Arizona, in early
19 August 2010. Arizona has a legitimate interest in insuring that business in the state is conducted
20 honestly and appropriately. *State v. Corbin*, 151 Ariz. 118, 726 P. 2d 215 (1986). The court has
21 a duty to grant an injunction when an entity is operating without proper authority. *Electric*
22 *Construction Company v. Flickinger* 12 Ariz. App. 500, 472 P 2d 111 (1970).
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26 C. Request for Waiver of Bond.

If a bond is required, Plaintiffs request that the court waive any bond requirement, or if

1 required, impose only a nominal bond on Plaintiffs because 1) Plaintiffs are not seeking to
2 enforce any action which would cost the Defendants any money, hence no bond should be
3 needed; and 2) Plaintiffs are requesting that Defendants refrain from entering into contracts with
4 private prison providers which would arguably be voidable due to the fact that none of the
5 contracts can be shown to comply with A.R.S. § 41-1609.01(K), (M) or (H), which are required
6 by Arizona law before the State may enter into a contract. Because the contracts are voidable,
7 there would be no damages resulting from preventing Defendants from entering into the
8 contracts in violation of state law, hence no need to post a bond.
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11 RESPECTFULLY SUBMITTED this 18th day of November 2011.

12 /s/

13 _____
14 VINCE RABAGO
15 Attorney for Plaintiffs

16 Distributed electronically.
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